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In The

Supreme Court of the United States

MAY TERM 1979

No. 78-1643

JOSEPH MARCERA and JOHN DILLMAN, Individually and on behalf of all others similarly situated,

Respondents,

v.

STEPHEN CHINLUND, JOSEPH WASSER, and DOROTHY WADSWORTH, Individually and in their official capacities as members of the New York State Commission of Correction,

Respondents,

and

WILLIAM LOMBARD, Individually and in his official capacity as Sheriff of Monroe County and on behalf of all other persons similarly situated,

Petitioner.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner submits this Reply to Respondent's Brief in Opposition to the request for Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Second Circuit entered on February 27, 1979.

Respondent's Brief in Opposition to the Petition for the Writ of Certiorari concedes at page 3 of their Brief that:

> "... these decisions, in part, cover the largest facilities in New York State which are within New York City ..."

Respondents should also have continued that the decisions they cited for the propositions of "constitutional right to contact visitation" in reality covers a group of older jails with numerous Court findings of deplorable conditions of overcrowding, sanitary and other substandard conditions of confinement. *Rhem v. Malcolm*, ("Rhem I"), 371 F. Supp. 594; *Rhem v. Malcolm*, ("Rhem II"), 527 F. 2d 1041; *Detainees of the Brooklyn House of Detention v. Malcolm*, 421 F. Supp. 832; *Forts v. Malcolm*, 426 F. Supp. 464; *Miller v. Carson*, 563 F. 2d 741 (1977).

Contrast these conditions with the acknowledged fact that the Monroe County Jail is "among the most modern and well run jail facilities in the State of New York." (See Appendix B of Petitioner's Brief p. A-9, Findings of Fact No. 5). Clearly, the Petitioner's modern facility compares favorably with the Metropolitan Correctional Center in New York City with this Court in its most recent decision ruled its conditions did not violate the Constitution. *Bell v. Wolfish*, ____U.S.____ (docket no. 77-1829, 47 *Law Week*, p. 4507 [1979]).

While the Second Circuit Court of Appeals had admitted its responsibility to avoid being "enmeshed in the minutiae of day-to-day administration", *Marcera v. Chinlund*, 78-2081, slip op. at 1479 (2d Cir. February 27, 1979), Respondent cannot possibly be right at page 4 of its Brief by saying that we have avoided such a state in the instant case. Here the Second Circuit is compelling the expenditure of millions of dollars now and many more in the future by the County jails of New York State and requiring detailed plans to be formulated and reviewed by the Federal Courts as to contact visitation. It does not stop there, as Judge VanGraafeiland points out:

> "Carrying out this Court's mandate will not be a simple and inexpensive matter. For example, at the same time my brothers hold the right to contact visits to be 'founded on the bedrock of our criminal jurisprudence', they say that pretrial detainees can be deprived of this valuable

> constitutional right through 'classification' schemes designed by jail officials to weed out security risks. They do not explain how state officials can create a workable 'classification' scheme for a group of pretrial detainees, all of whom are presumed to be innocent, that will mark one as a security risk and not another. They likewise do not state how the valuable constitutional right to contact visits can be taken from any detainee without the trappings of due process. . ."

Again this is contra the ruling of this Court in *Bell v. Wolfish*, supra at pp. 4513-4514.

Further, the Respondent's statement at page 5 of its Brief that contact visitation is "a constitutional right and is rapidly becoming the universally accepted norm across the nation is incorrect".

> "As for contact visits, we can discover no constitutional guarantee that such visits may take place. The question is simply whether considerations of Jail security and order make it reasonable for the authorities to refuse visits of this nature ... Unless the denial of contact visits on security grounds can be found, on the basis of evidence of record, and with reasonable deference to the expertise of Jail authorities, to be 'exaggerated' response by Jail officials, see Jones, supra, the district court should not have substituted its judgment as to security needs for that of the officials."
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> *Feeley v. Sampson*, 570 F. 2d, 364 (1978) at p. 373; See also *Main Road v. Aytch*, 565 F. 2d, 54 (1977); *United States ex rel Tyrrell v. Speaker*, 535 F. 2d, 823 (3d Cir. 1976).

In addition, the national studies cited by Respondents at page 5 of its Brief are irrelevant as they may state that contact visitation is beneficial but they certainly have no bearing on whether such is a constitutional right. They are also inapplicable to the vast majority of New York State County jails for as Commissioner Chinlund testified at the time of his deposition no formal studies have ever been done with regard to the cost or

implementation of contact visits at the County facilities in this case. (See Petitioner's Brief, Appendix B A-9, para. 4 at pp. A-171-172 of the Appellate record below). This is especially significant in view of the fact that the contact visitation concept has been implemented in jails for decades (See p. 172 of the Appellate record below). Further, the contact visitation concept has its own recognized dangers.

> "What is involved in this issue of contact visits is that, pursuant to the considered judgment of the D.C. officials, the new jail, for security reasons, has been constructed so that there will be no contact visits except between prisoners and their lawyers and religious emissaries ... A reading of the transcripts in *United States v. Gorham et al.*, 173 U.S. App. D.C. 139, 523 F.2d 1088 (1975) and *United States v. Bridgeman et al.*, 173 U.S. App. D.C. 150, 523 F.2d 1099 (1975), cert. denied, 425 U.S. 961, 96 S. Ct. 1744, 48 L.Ed.2d 206 (1976), involving the recent riots and mass jail breaks at the D.C. Jail, reveals some of the recognized evils of 'contact visits.'
>
> dissent *Campbell v. MaGruder*, 580 F.2d 521 (1978) at pp. 566-567.

Respondent's Brief at pages 6 and 7 still fails to answer the basic concern expressed by Judge VanGraafeiland (See p. 10 of Petitioner's Brief) that the very clear rule against appealing class certification Orders is being undermined by simply coupling the request for class certification with the motion for preliminary injunction. It is also clear that far from being "preliminary relief", the injunction granted by the Second Circuit is the ultimate relief sought by the Plaintiffs. This was certainly judicial efficiency (p. 7 of Respondent's Brief) achieved by eliminating the trial of issues in the instant case and the presentation of defenses by the Defendants in derogation of the due process clause of the Constitution.

For the foregoing additional reasons, it is respectfully requested that this Court grant a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Second Circuit.

Dated: May 21, 1979.

Respectfully submitted,

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